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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 937

In the Matter of

ARTHUR BENNETT, an Attorney,

Petitioner,

—against—

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

ANGELO T. COMETA,
Attorney for Co-ordinating Committee on Discipline, Respondent.

DANIEL J. McMAHON,
On the Brief.

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Preliminary Statement

This is a petition for a writ of certiorari to review an order of affirmance of the Court of Appeals of the State of New York made and entered December 3, 1964.

By order dated January 30, 1964, the Appellate Division, First Department, disbarred the petitioner. Thereafter *petitioner* moved for leave to reargue, or in the alternative, for leave to appeal to the Court of Appeals from the said order of disbarment. The Appellate Division denied petitioner's motion by order dated March 24, 1964, whereupon petitioner appealed to the Court of Appeals.

Respondents moved in the Court of Appeals to dismiss the petitioner's appeal, which motion was denied. Thereafter, the Court of Appeals heard petitioner's appeal and affirmed the order of the Appellate Division, without opinion. 14 N. Y. 2d 878.

POINT I

No evidence was suppressed and there was no denial of due process to petitioner.

The Issue Presented

The issue presented on this petition for a writ of certiorari is that trial counsel for respondent at the hearings before the Referee, withheld evidence and sat by while false evidence was adduced by respondent's witnesses on direct examination, giving rise to the claim of lack of due process.

The answer to this contention is that no evidence was withheld and no false evidence was adduced, and there was no lack of due process.

Assuming, *arguendo*, that there were any omissions or errors of fact in the direct testimony of respondent's witnesses, they were corrected on cross-examination by petitioner's experienced trial counsel, to whom respondent's trial counsel voluntarily made available every prior statement of respondent's witnesses from which statements any omissions or errors in recollection could be corrected.

The record submitted to the Referee, the Appellate Division and the Court of Appeals was correct and complete. There was no procedural flaw in the proceedings below and on the merits, the proof of serious professional misconduct

was ample to sustain the unanimous order of disbarment and its affirmance by the Court of Appeals. Petitioner was deprived of no constitutional rights.

The main thrust of petitioner's contention of lack of due process is an attack upon the conduct of respondent's trial counsel, Allen Harris, who tried the instant disciplinary proceeding with scrupulous fairness.

The Appellate Division disposed of petitioner's charge of lack of due process when it said in its opinion:

> "We have examined the record in the light of the contention that the requirements of due process were not met. This is largely grounded on the allegation that testimony was adduced by promises of leniency made by the Assistant District Attorney who presented the matters involved to a New York County Grand Jury and who was trial counsel for petitioner in this proceeding. It is also asserted that false testimony was adduced in this proceeding to the knowledge of petitioner's trial counsel. *A careful examination of the record establishes no factual basis for these contentions.* The record demonstrates that the matter was fully, fairly and scrupulously presented." *Matter of Bennett,* 20 A. D. 2d 218, 221 [Emphasis supplied].

The Facts Involved

Charge 2—The "Kaston" Case

Petitioner's theory that Kaston inculpated him as part of a "deal" with the District Attorney's office as a result of which Kaston would be permitted to plead to a misdemeanor, has no basis in fact. The truth is that when Kaston implicated petitioner in a fraudulent scheme, he disclosed no information of real value to the District Attor-

ney's office, which was looking for information, if any existed, that would supply the corroboration necessary under the Penal Law to support an indictment of petitioner or anyone else who might have been involved in the conspiracy to prosecute fraudulent accident claims (2738, 2739, 2748, 2768, 2769).* No such information was given by Kaston to the District Attorney's office (2767), and no indictment of petitioner or others resulted.

The reasons why Kaston was permitted to plead to a misdemeanor were that he had no prior criminal record, that he had made restitution, that he had finally taken the posture of cooperating with the District Attorney's office (albeit he supplied no information of value to the prosecutor, as indicated above), and that the acceptance of a lesser plea was conventional practice in this type of case (2743, 2744). The fact that Kaston had pleaded to a misdemeanor was brought out in the disciplinary proceeding by Mr. Harris on direct examination (567).

Petitioner did not call Kaston as a witness at the reopened hearings, even though he indicated that he intended to do so (2704); instead, petitioner resorts to innuendo in postulating a "deal" which never existed, and which petitioner knew he could not prove.

Charge 1—Irving Blum

Petitioner contends that Irving Blum may have been given an "inducement" to inculpate petitioner before the Referee by way of an understanding that if he did so, his mother, Clara Blum, would not be called to testify as a witness by respondent.

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* Parenthetic numerical references are to the transcript of testimony, unless otherwise noted.

This conclusion is not supported by the facts. Blum inculpated petitioner in his preliminary testimony before the Co-ordinating Committee; otherwise there would have been no specification as to Blum under this charge. Petitioner's statement (Pet. brief, p. 8) that Mr. Harris admitted, under oath, "that Blum had changed his story in the course of a pre-trial preparation session with Mr. Harris" and for the first time inculpated petitioner, is not the fact (2804); there was no substantial change by Blum except as to the matter of referral to the doctor and payment of the medical bill (38, 39, 2789); before the Committee, Blum said his recollection was that petitioner had not referred him to a doctor. Respondent made available to petitioner a copy of the transcript of Blum's testimony before the Committee (27), and there is, therefore, no excuse for petitioner's incorrect statement of fact in this area.

Clara Blum is an elderly lady in her late sixties (2799); she suffered a head injury; she had difficulty with transportation (2790); both Irving Blum and his wife requested that the elder Mrs. Blum not be called as a witness if not necessary (2790, 2791). The inferences which petitioner draws from these facts are unfounded.

Petitioner did not call the Blums as witnesses at the reopened hearings when he had ample opportunity to do so; instead of adducing their testimony in support of his allegations, petitioner resorts to innuendo to attempt to prove a "deal" to influence the testimony of the Blums, which he knows is non-existent.

Charge 1—Alvin Denbaum

The charge that petitioner submitted to an insurance company a false letter of loss of earnings in the course of

prosecuting a claim for personal injuries of his client, Alvin Denbaum, was not sustained by the Referee on the ground of insufficiency of proof (Report, 34).

Respondent accepted the Referee's finding, and did not move before the Appellate Division to disaffirm his report. Accordingly, the Denbaum specification was not litigated before the Appellate Division and played no part in the decision of the Court of Appeals to affirm the order of disbarment. Petitioner's statement that "it corroborates the pattern of suppression here involved" (Pet. brief, p. 8) is an unfounded inference that is totally irrelevant on its face.

Charge 4—Stanley Benjamin

Petitioner argues (Pet. brief, p. 10) that withholding of evidence permeated the Benjamin issue. To the contrary, Benjamin testified on more than one occasion, and respondent turned over to petitioner copies of the transcripts of Benjamin's testimony on other occasions, as follows:

1) Benjamin's testimony before the Grand Jury in the Kaston case;

2) Benjamin's testimony before the Co-ordinating Committee;

3) Benjamin's testimony before Referee Wasservogel in the Gladstone disciplinary proceeding;

4) Benjamin's testimony before Referee Wasservogel in the Greenberg disciplinary proceeding. (Upon completion of the trial Referee Wasservogel died before rendering his report and the case had to be retried);

5) Benjamin's testimony before Referee MacKinnon in the re-trial of the Greenberg disciplinary proceeding.

Petitioner had at his disposal, all of this voluminous testimony by Benjamin on other occasions, and in his effort to find inconsistencies and error, petitioner comes up with only one contention in his petition (Pet. brief, p. 10), and this is without foundation; petitioner here turns to the testimony of Mr. Harris in the Greenberg proceeding (Ex. D). First of all, Exhibit D was produced *voluntarily* by respondent, notwithstanding that at the time, the Greenberg proceeding was not finished; this is a sharply etched instance of co-operation, not of withholding evidence. From the aforementioned Exhibit D it appears that Mr. Harris, when an Assistant District Attorney, did *not* tell Mr. Benjamin that if he co-operated with the People he would not be indicted (1858, 1859). When Mr. Harris was asked if he conveyed the impression to Benjamin that if he co-operated he would not be disciplined by the Appellate Division, Mr. Harris answered (1859):

> "The only thing I told Mr. Benjamin, Mr. Feldman, was that I would bring it to the attention of the Appellate Division what co-operation he had given to the District Attorney's office, for whatever use the Appellate Division wanted to make of it."

Petitioner attempts to make capital of Mr. Harris' denial that he told Benjamin that petitioner had confessed to making payments to Benjamin. Benjamin was mistaken in his recollection on this point. If petitioner thought the point important enough, he had ample opportunity to develop it, if he wished to do so, by calling Benjamin as a

witness at the re-opened hearings before the Referee. But petitioner did not call Benjamin at the re-opened hearings. Petitioner refrained from calling Benjamin to the stand because he knew that once he pointed out to Benjamin this inconsistency between Benjamin's recollection and Mr. Harris' recollection Benjamin would admit that the recollection of Mr. Harris was more accurate than his. Here again, petitioner, absent proof, prefers to resort to innuendo, as he has throughout this entire proceeding.

The Appellate Division developed the Benjamin charge very carefully, as appears from its opinion under Charge 4. *Matter of Bennett, supra,* at p. 220.

Petitioner Was Treated With Fairness

Petitioner has attempted to create a sinister inference from the manner in which respondent conducts its preliminary inquiries, that is, *in camera* (Pet. brief, pp. 8, 9). Such inferences are gratuitous at best, and in an effort to dispel any doubts as to the purpose of the Committee and the procedure by which it operates, a historical note may be in order.

The supervision of the professional conduct of attorneys in the State of New York is imposed by statute upon the Appellate Division of the Supreme Court (subdivision 2 of § 90 of the Judiciary Law)

Because of widespread abuses prevalent in the prosecution of personal injury claims, the Appellate Division of the Supreme Court of the State of New York, First Judicial Department made an order on February 3, 1959 authorizing and directing the Co-ordinating Committee on Discipline to conduct, under the personal supervision of

the Presiding Justice of the Appellate Division, a continuing investigation into the conduct of attorneys in the prosecution and defense of personal injury claims and of those employed by or associated with them.

Unlike the typical bar association investigation arising out of a specific complaint, this Committee does not generally operate on the basis of information supplied by an aggrieved complainant. As a result, its investigative procedures are surrounded by safeguards to protect the rights of attorneys being investigated (these safeguards are enumerated below).

Such an investigation as conducted by the Committee under the supervision of the Court is a non-adversary proceeding analogous to a Grand Jury proceeding, as was stated by the Court of Appeals of the State of New York in the landmark opinion of Chief Judge Cardozo in *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, and that analogy was reiterated by this Court in *Anonymous 6 and 7* v. *Baker*, 360 U. S. 287.

The procedures of respondent were eminently fair to petitioner:

1. Petitioner was given written notice by respondent of the institution of the preliminary investigation of his negligence practice prior to the interrogation of any witness.

2. The investigation was directed only to *closed* accident cases.

3. Petitioner was represented by counsel of his choice who was present when he was interrogated by respondent during the preliminary investigation.

4. Petitioner was permitted to obtain a copy of the transcript of his testimony given in the preliminary investigation.

5. Petitioner was served with detailed charges and specifications spelling out the professional misconduct charged and identifying the cases involved by name of claimant and date.

6. In response to his demand petitioner was given a Bill of Particulars consisting of 7 pages and 14 exhibits by respondent.

7. Petitioner was given an opportunity to examine the closed insurance company files in the cases which are specified in the petition.

The Law at Issue

The law applicable to the conduct of a disciplinary proceeding, the quantum of proof and the degree of discipline, is clearly stated in *Matter of Flannery,* 212 N. Y. 610, 611:

> "*Per Curiam.* The Appellate Division has found the appellant guilty of gross unprofessional conduct and has decreed his disbarment. On this record our power of review is limited to the consideration of the single question whether the finding of guilt has any evidence to sustain it. (*Matter of Goodman,* 199 N. Y. 143; *Matter of Robinson,* 209 N. Y. 354.) It is not for us, where the evidence is conflicting, to determine where lies the truth. It is not for us, where opposing inferences may be drawn, to determine which we shall accept and which reject. It is not for us to revise the measure of punishment which guilt, when adjudged, is to entail. In estab-

lishing the standard of conduct to which the bar must at its peril conform, the Appellate Division has a wide discretion, with which we have neither the wish nor the power to interfere. If the conduct condemned is not wholly blameless, the extent to which it shall be reprobated is not for our determination. We have no right to say, where any measure of blame attaches to the offense, that the standard has been set too high.

"In the light of these guiding principles we have considered this voluminous record, and have reached the conclusion that the evidence sustains the findings. It would serve no useful purpose to follow the course of the proofs and to point out the inferences to be drawn from them. The court below, where conflicting inferences may have been possible, has seen fit, after weighing the evidence, to draw those adverse to the appellant, and to the rectitude of his purposes and motives. Drawing these inferences it has held that his conduct falls short of the standard to which the members of an honorable profession must conform. The appellant would have us say that the conduct which the court below has thus condemned is wholly free from blame. We are asked in effect to serve notice on the bar that what was done by the appellant may with impunity and honor be done by others. We cannot give that word.

"The order of disbarment should be affirmed."

Petitioner attempts to circumvent the holding in *Flannery* which is controlling in the proceeding at bar, and tries in his petition to give a distorted and factually incorrect portrayal of the record below in order to bring himself under the umbrella of *People* v. *Savides*, 1 N. Y. 2d 554 (Pet. brief, p. 12). In that case the prosecutor did not inform the Court and the jury of an understanding that he had with a witness

to plead to a lesser crime. *Savides* is not applicable to the case at bar since there was no such understanding with any of the witnesses against petitioner. Another factor to be borne in mind is that a disciplinary proceeding against an attorney does not involve a jury which might possibly be misled by evidence which would not mislead a Referee. As the Court said in *Matter of Shufer*, 12 A. D. 2d 208, 213:

> "... However, because a disciplinary matter is heard before a legally trained referee without the use of a layman jury the same strict application to such common-law rules is not critical, albeit eminently desirable. The Referee, in this case a distinguished and especially able former Supreme Court Justice, and later the reviewing court are quite capable of selecting that which is admissible from that which is not and making certain that the proof in support of the charges meets the test of the common-law rules. Of course, it is much the better practice to keep the proceedings confined to evidence which may be properly utilized in determining the charges."

Petitioner (Pet. brief, p. 14) relies upon the case of *Brady* v. *State of Maryland*, 373 U. S. 83. *Brady* involved suppression by the prosecution of a confession of guilt made by one defendant, which was material to the guilt or punishment of a second defendant who was convicted of murder in the first degree. The Court held that the prosecutor's failure to disclose this exculpatory evidence deprived the defendant of due process. This decision has no relevancy to the facts in the instant case. A significant comment by the United States Supreme Court in *Brady* is as follows:

> "We usually walk on treacherous ground when we explore state law, for state courts, state agencies and state legislatures are its final expositors under our Federal system."

In *U. S. ex rel. Meers* v. *Wilkins*, 326 F. 2d 135 (C. C. A. 2), cited by petitioner, *ibid.*, the prosecutor failed to disclose to the court and to the defense that he knew that two witnesses who were present at the scene of a robbery positively stated that they had not seen the defendant there. The Circuit Court of Appeals held, after the defendant had been convicted in the State court, that this suppression of evidence was a violation of due process. This case has no relevancy to the instant application.

The other cases cited by petitioner (Pet. brief, pp. 11-14) are equally inapplicable here.

Petitioner's basic complaint is that his counsel adduced on cross-examination some evidence which he feels trial counsel for respondent should have adduced on direct examination. Petitioner glosses over the factor of prime importance, namely that respondent's trial counsel *voluntarily* made available to counsel for petitioner all of the material from which such evidence was adduced. Nothing was withheld and nothing was suppressed; and, as the Appellate Division said, there is no factual basis for petitioner's contention of lack of due process. To put it another way, the conclusion to be drawn from petitioner's argument is that he feels aggrieved because respondent's trial counsel did not try petitioner's case. This is a frivolous contention, particularly since petitioner was represented by experienced trial counsel who has participated in similar disciplinary proceedings. See *Matter of Golenbock*, 13 A. D. 2d 178; leave to appeal denied, 9 N. Y. 2d 971; *Matter of*

Lemkin, 17 A. D. 2d 550, leave to appeal denied 13 N. Y. 2d 724, cert. denied 375 U. S. 892; *Matter of Greenberg*, 19 A. D. 2d 375; *Matter of Shufer*, cited *supra*; *Matter of Anonymous No. 1* v. *Co-ordinating Committee*, cert. denied, May 18, 1964, 377 U. S. 933.

The Significance of the "Constitutional" Issue in Relation to Punishment

Petitioner speculates (Pet. brief, p. 15) as to how much better his position would be if somehow Charges 1, 2 and 4, where his professional conduct was found to be corrupt and venal, were erased from the record, and a lesser degree of discipline imposed based upon Charges 6, 8 and 9. It is futile to pursue this fantasy in the light of the amply sustained proof of petitioner's acts of professional misconduct under Charges 1, 2 and 4, which are just a hair's breadth away from the commission of felonies. *Matter of Flannery*, cited *supra*.

It avails petitioner nothing to assert a constitutional question which does not in fact exist, *Matter of Shufer*, 12 A. D. 2d 208; motion for leave to appeal denied, cross-motion to dismiss the appeal granted, and the appeal dismissed upon the ground that no substantial constitutional question is directly involved, 9 N. Y. 2d 611. A clear and persuasive demonstration of the existence of a constitutional question, as well as of its substantiality, are required (cf. *People* v. *Foote*, 273 N. Y. 629, cert. denied, 302 U. S. 760; *Fryberger* v. *Harris Co., Inc.*, 273 N. Y. 115, 291 N. Y. 556, appeal dismissed, no substantial constitutional question; *Matter of Grade Crossing*, 261 N. Y. 541; *Bonner* v. *Gorman*, 213 U. S. 86, 91). There is no factual basis in the record below to support petitioner's contentions of lack of due process, and this requirement of Title 28, United States Code, Section 1257, has not been met.

CONCLUSION

The petition for writ of certiorari should be denied.

March, 1965

Respectfully submitted,

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DANIEL J. MCMAHON,
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